RESPONSE REQUESTED

ORIGINAL

Nos. 05-7496, 05-7664

Supreme Court, U.S.
FILED
FEB 28 2006
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IN THE SUPREME COURT OF THE UNITED STATES

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CECILIO MENDOZA-TORRES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

---

REYMUNDO TOLEDO-FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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# BRIEF FOR THE UNITED STATES

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## QUESTIONS PRESENTED

The following question presented is common to all petitioners in Nos. 05-7496 and 05-7664:

Whether petitioners' prior state convictions for possession of a controlled substance constitute "aggravated felon[ies]" triggering a recommended sentence enhancement under Section 2L1.2(b)(1)(C) of the Sentencing Guidelines.

The following questions presented apply only to petitioners in No. 05-7496:

1. Whether error in applying the federal system of Sentencing Guidelines as mandatory warrants automatic reversal under plain-error review.

2. Whether, to demonstrate plain error based on this Court's decision in United States v. Booker, 543 U.S. 220 (2005), petitioners were required to show a reasonable probability that they would have received more lenient sentences under an advisory system of Sentencing Guidelines.

3. Whether this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), should be overruled.

The following question presented applies only to petitioner Guardado-Ortega in No. 05-7496:

Whether the court of appeals erred in refusing to consider on the merits petitioner's claim that his sentence violated his Sixth Amendment rights, under United States v. Booker, 543 U.S. 220 (2005), where petitioner raised that claim for the first time in a petition for a writ of certiorari.

IN THE SUPREME COURT OF THE UNITED STATES

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No. 05-7496

CECILIO MENDOZA-TORRES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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No. 05-7664

REYMUNDO TOLEDO-FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITIONS FOR WRITS OF CERTIORARI
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# BRIEF FOR THE UNITED STATES

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## OPINIONS BELOW

The opinions of the court of appeals (05-7496 Pet. App. 41-77; 05-7664 Pét. App. A19-A20) are not reported.

## JURISDICTION

The court of appeals entered its judgments in the cases of petitioners Mendoza-Torres and Sauzo-Izaguirre in No. 05-7496 on

August 15, 2005. The court of appeals entered its judgments in the cases of petitioner Toledo-Flores in No. 05-7664 and of petitioners Ramirez-Maldonado, Alejo-Agramon, Eguia-Hernandez, Armendariz-Chavez, Palencia-Contreras, and Colatos-Rivas in No. 05-7496 on August 17, 2005. The court of appeals entered its judgments in the cases of petitioners Vences, Guardado-Ortega, and Loredo-Pecina in No. 05-7496 on August 24, 2005, September 30, 2005, and October 4, 2005, respectively. The petition for writs of certiorari in No. 05-7496 was filed on November 9, 2005. The petition for a writ of certiorari in No. 05-7664 was filed on November 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

In separate proceedings in the United States District Court for the Southern District of Texas, each petitioner pleaded guilty to illegally reentering the United States after having been deported following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326. In each case, the court of appeals affirmed. See 05-7496 Pet. App. 41-77; 05-7664 Pet. App. A19-A20.

1. Under 8 U.S.C. 1326, Congress set the baseline maximum sentence for illegal reentry at two years of imprisonment. 8 U.S.C. 1326(a). The Sentencing Guidelines provide a base offense level of eight for illegal reentry and authorize an eight-level upward adjustment if the defendant committed an "aggravated felony" before removal. Sentencing Guidelines § 2L1.2(b)(1)(C). The

Sentencing Guidelines adopt the definition of "aggravated felony" in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43). See Sentencing Guidelines § 2L1.2, comment. (n. 3(A)). Section 1101(a)(43)(B), in turn, defines "aggravated felony" to include a "drug trafficking crime," as defined in 18 U.S.C. 924(c). Finally, 18 U.S.C. 924(c)(2) defines a "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)."

2. Petitioners were charged with illegal reentry in violation of 8 U.S.C. 1326. They pleaded guilty and were sentenced under the eight-level aggravated-felony enhancement of Guidelines § 2L1.2(b)(1)(C) because each of them had a state-law felony conviction for possession of a controlled substance before his removal. Petitioner Loredo-Pecina in No. 05-7496 was sentenced to 15 months of imprisonment (see 04-40440 Gov't C.A. Br. 3); petitioner Ramirez-Maldonado in No. 05-7496 was sentenced to 21 months of imprisonment (see 04-40749 Gov't C.A. Br. 3); petitioner Guardado-Ortega in No. 05-7496 was sentenced to 22 months of imprisonment (see 04-20299 Gov't C.A. Br. 4); petitioner Armendariz-Chavez in No. 05-7496 and petitioner Toledo-Flores in No. 05-7664 were each sentenced to 24 months of imprisonment (see 04-40674 Gov't C.A. Br. 3; 05-7664 Pet. App. B22); petitioner Colatos-Rivas in No. 05-7496 was sentenced to 30 months of imprisonment (see 04-20366 Gov't C.A. Br. 3); petitioners Sauzo-

Izaguirre and Alejo-Agremon in No. 05-7496 were sentenced to 33 months of imprisonment (see 04-40434 Gov't C.A. Br. 3; 04-40919 Gov't C.A. Br. 3); petitioner Vences in No. 05-7496 was sentenced to 34 months of imprisonment (see 04-40504 Gov't C.A. Br. 3); petitioners Mendoza-Torres and Eguia-Hernandez in No. 05-7496 were sentenced to 36 months of imprisonment (see 04-40672 Gov't C.A. Br. 3; 04-41118 Gov't C.A. Br. 3); and petitioner Palencia-Contreras in No. 05-7496 was sentenced to 37 months of imprisonment (see 04-41366 Gov't C.A. Br. 4).

3. The court of appeals affirmed in 12 separate unpublished decisions. See 05-7498 Pet. App. 41-77; 05-7664 Pet. App. A19-A20. In each case, the court applied controlling circuit precedent to hold that the individual petitioner's prior drug-possession conviction constituted an aggravated felony for purposes of the Sentencing Guidelines' illegal-reentry provision, Section 2L1.2(b)(1)(C). See 05-7496 Pet. App. 41-42, 47-48, 49-50, 52-53, 56, 59, 61, 64, 68-69, 73, 76-77; 05-7664 Pet. App. A20.

Petitioners Mendoza-Torres, Sauzo-Izaguirre, Ramirez-Maldonado, Alejo-Agramon, Eguia-Hernandez, Palencia-Contreras, Colatos-Rivas, Vences, and Loredo-Pecina in No. 05-7496 also argued that their prior felony convictions constituted an element of the offense that should have been charged in the indictment and established through a guilty plea or found at trial beyond a reasonable doubt. The court of appeals rejected that argument

based on Almendarez-Torres v. United States, 523 U.S. 224 (1998). See 05-7496 Pet. App. 42, 48, 50-51, 53, 56, 61, 64, 69, 77.

In addition, each petitioner in No. 05-7496 argued for the first time on appeal that the district court had committed reversible error by sentencing him under the mandatory Sentencing Guidelines regime that this Court ruled unconstitutional in United States v. Booker, 543 U.S. 220 (2005). See 05-7496 Pet. App. 42-43, 45, 51, 53-54, 56-57, 59, 61-62, 64-65, 67, 71, 75. Reviewing those claims for plain error, the court of appeals held that the district court committed an error that was plain by sentencing the petitioners under a mandatory Guidelines system, but that the petitioners had not shown that the error affected their substantial rights. See ibid.

DISCUSSION

1. The petition in No. 05-7496 should be denied with respect to four of the petitioners, Colatos-Rivas, Guardado-Ortega, Loredo-Pecina, and Ramirez-Maldonado. The petition exclusively raises questions that challenge those petitioners' criminal sentences. 05-7496 Pet. i. But, according to the Department of Homeland Security, each of those petitioners has completed his sentence and has been removed from the jurisdiction of the United States.[1] "The

[1] According to the Department of Homeland Security, Colatos-Rivas was removed to El Salvador on February 10, 2006; Guardado-Ortega was removed to Mexico on July 1, 2005; Loredo-Pecina was removed to Mexico on January 14, 2005; and Ramirez-Maldonado as removed to Mexico on August 5, 2005.

[]incarceration that [each] incurred * * * is now over, and cannot be undone." Spencer v. Kemna, 523 U.S. 1, 8 (1998). Resolution of this case thus could not have the type of practical effect on those petitioners that would warrant an exercise of this Court's certiorari jurisdiction and, indeed, the case may be moot with respect to those petitioners.

First, because petitioners now reside in either Mexico or El Salvador, they are not presently under the jurisdiction, custody, or control of the United States government. Were the Court both to grant review and to reverse the convictions, the decision would have no practical or legal impact on petitioners' liberty.

Second, the determination at sentencing that petitioners' prior state-law convictions were for aggravated felonies would have prospective effect only if petitioners again violate United States law by again reentering the United States illegally. But a defendant cannot evade mootness principles with respect to a completed sentence by pointing to the possible consequences of the sentence if he were to commit future crimes. Petitioners themselves are "able -- and indeed required by law -- to prevent" any adverse prospective consequences "from occurring" by not reentering the United States illegally. Spencer, 523 U.S. at 15 (quoting Lane v. Williams, 455 U.S. 624, 633 n.13 (1982)).

Third, the potential collateral immigration consequences of the determination at sentencing that petitioners had committed an

aggravated felony are insufficient to perpetuate the controversy and to merit this Court's review. Because each petitioner unquestionably has committed both a controlled substance offense and the federal felony of illegal reentry, the prospects of obtaining prospective immigration relief -- relief petitioners make no claim to be seeking or intending to seek -- are too speculative to justify an exercise of this Court's certiorari jurisdiction and may be too speculative to avoid mootness. See 8 U.S.C. 1101(a)(43)(B) and (O).[2]

2. Petitioners contend (05-7496 Pet. 7-14; 05-7664 Pet. 9-17) that the court of appeals erred in determining that their pre-deportation convictions for drug possession constitute aggravated felonies that support application of an eight-level enhancement under Sentencing Guidelines § 2L1.2(b)(1)(C).

On January 24, 2006, the United States filed a brief at the certiorari stage in Lopez v. Gonzales, No. 05-547, which agreed with the petitioner in that case that the Court should grant certiorari to decide whether the commission of a controlled

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[2] United States v. Campos-Serrano, 404 U.S. 293 (1971), and United States v. Villamonte-Marquez, 462 U.S. 579 (1983), are not to the contrary. Those cases were not mooted by a defendant's removal because it was the *government* that sought this Court's review to reinstate an overturned criminal *conviction*, not to challenge a criminal sentence. Reinstatement of that conviction could have led to extradition of the defendants and the existence of the convictions could have had distinct immigration consequences. See Villamonte-Marquez, 462 U.S. at 581 n.2; Campos-Serrano, 404 U.S. at 295.

substance offense that is a felony under state law, but that is generally punishable under the Controlled Substances Act only as a misdemeanor, constitutes an "aggravated felony," within the meaning of 8 U.S.C. 1101(a)(43). The issue in Lopez arises in the context of a removal proceeding under federal immigration law, rather than in the criminal sentencing context. Nevertheless, should this Court grant the petition for a writ of certiorari in Lopez, the Court's decision in that case will shed light on the proper interpretation of the same statutory provision, 8 U.S.C. 1101(a)(43), that Sentencing Guidelines § 2L1.2(b)(1)(C) incorporates. The Court's decision thus may influence the lower courts' voluntary application of the Sentencing Guidelines' aggravated-felony enhancement in illegal reentry cases like petitioners'. Therefore, the Court may wish to hold the petition in No. 05-7664 and the petition in No. 05-7496, with respect to the first question presented only and with respect to petitioners Mendoza-Torres, Suazo-Izaguirre, Alejo-Agramon, Eguia-Hernandez, Armendariz-Chavez, Palencia-Contreras, and Vences only, pending the Court's disposition of the petition for a writ of certiorari in Lopez v. Gonzales, No. 05-547.

3. With respect to each petitioner in No. 05-7496, the district court at sentencing treated the Sentencing Guidelines as mandatory. That was error, in light of this Court's decision in United States v. Booker, 543 U.S. 220 (2005). Petitioners contend

(Pet. 18-21) that every misapplication of the Sentencing Guidelines as mandatory necessarily constitutes "structural" error affecting a defendant's substantial rights, and thus automatically survives plain-error review under Federal Rule of Criminal Procedure 52(b) and requires reversal for a new sentencing. That claim does not merit further review and, in fact, is foreclosed by Booker itself:

> Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test.

543 U.S. at 268. If, as petitioners' contend, each erroneous application of the Sentencing Guidelines necessarily established structural error that required reversal, the Court would not have invited application of the plain-error doctrine to Booker claims, nor would it have envisioned appeals that do not lead to a new sentencing hearing.

Contrary to petitioners' argument (Pet. 21), the case need not be held pending this Court's decision in Washington v. Recuenco, No. 05-83, cert. granted, 126 S. Ct. 478 (2005). That case presents the question whether a preserved sentencing error under this Court's decision in Blakely v. Washington, 542 U.S. 296 (2004), that implicates the defendant's Sixth Amendment rights is subject to harmless error analysis under Neder v. United States, 527 U.S. 1 (1999). The Recuenco case thus presents no occasion for the Court to address the application of plain-error review to

Booker claims, and it is unlikely to shed any significant light on petitioners' claims for automatic reversal based on unpreserved errors that do not implicate a defendant's Sixth Amendment rights (see Pet. 21). That is a matter the Court already addressed in Booker, 543 U.S. at 268.

4. Petitioners in No. 05-7496 also argue (Pet. 21-27) that this Court's review is warranted because, in petitioners' view, the court of appeals has misapplied this Court's decision in United States v. Dominguez Benitez, 542 U.S. 74 (2004). Further review of that question is not warranted. In Dominguez Benitez, this Court held that a defendant must demonstrate a "reasonable probability" that a Rule 11 error affected his decision to plead guilty in order to establish plain error. Id. at 83. The Fifth Circuit has followed the Eleventh Circuit in applying the "reasonable probability" standard to hold that the "burden truly is on the defendant to show that the error actually did make a difference," such that "if it is equally plausible that the error worked in favor of the defense, the defendant loses," and if "the effect of the error is uncertain * * * the defendant loses." United States v. Mares, 402 F.3d 511, 521 (5th Cir.) (quoting and adopting the standard set forth in United States v. Rodriguez, 398 F.3d 1291 (11th Cir.), cert. denied, 125 S. Ct. 2935 (2005)), cert. denied, 126 S. Ct. 43 (2005).

This Court has already denied review within the last nine months in both Rodriguez and Mares. See Mares v. United States, 126 S. Ct. 43 (2005); Rodriguez v. United States, 125 S. Ct. 2935 (2005). There is no reason for a different result here. Quite the contrary, while petitioners express concern about the outcome of cases where the evidence is close or evenly balanced (Pet. 22-23), no petitioner below presented such a difficult case; most of them presented no evidence at all.[3] Petitioners thus have made no showing that any of them would be entitled to relief under the verbal formulation of the plain-error test that they advocate.

In any event, even if petitioners could have shown that the sentencing error affected their substantial rights, relief on

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[3] See 05-7496 Pet. App. 43; id. at 45 ("Absent any indication in the record" that petitioner would have received a lesser sentence, court could not conclude "with a probability sufficient to undermine confidence in the outcome" that the error affected petitioner's rights) (emphasis added); id. at 51; id. at 53-54 ("Alejo-Agramon has failed to point to anything in the record indicating that the district court would have reached a different conclusion had it known that the Sentencing Guidelines were advisory.") (emphasis added); id. at 57 ("Eguia concedes that the district court did not indicate that it would have imposed a lesser sentence in the absence of mandatory guidelines."); id. at 62 (petitioner "points to nothing in the record indicating that the district court would have imposed a lesser sentence under an advisory scheme") (emphasis added); id. at 65 (district court had already rejected mitigating evidence); id. at 67 ("Nothing in the record indicates that the sentencing judge would have given a lower sentence.") (emphasis added); id. at 71 (petitioner "concedes, however, that he cannot make the necessary showing of plain error that is required by [Mares]"); id. at 75 (petitioner "concedes that he cannot establish plain error because the record does not indicate that the district court would have reached a significantly different result under an advisory guidelines scheme").

plain-error review would not have been warranted in their cases. Petitioners make no claim that their sentences exceeded their respective advisory Guidelines ranges. As a result, their sentences did not call into question the fairness, integrity, or public reputation of sentencing proceedings, which is an additional requirement for relief under the plain-error test. See 04-1148 U.S. Br. 10-11, Rodriguez, supra. Because resolution of the question presented would have no practical effect on the outcome of any of petitioners' cases, this Court's review is not warranted.[4]

5. Petitioners contend (05-7496 Pet. 35-39) that this Court should grant review in order to overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998). That argument lacks merit. In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court held, as a matter of federal constitutional law, that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Since that time, the Court has repeatedly reaffirmed that the rule announced in Apprendi applies to any penalty-enhancing fact "other than a prior conviction." Booker, 543 U.S. at 244; see Blakely, 542 U.S. at 301; Dretke v. Haley, 541 U.S. 386, 395 (2004); see also Shepard v. United States, 125 S. Ct. 1254, 1262 (2005)

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[4] We have provided a copy of the government's brief in opposition in Rodriguez v. United States, No. 04-1148, to counsel for petitioners in No. 05-7496.

(plurality opinion). In addition, this Court has repeatedly denied petitions for writs of certiorari that have urged the overruling of Almendarez-Torres. See, e.g., Cerna-Salguero v. United States, 125 S. Ct. 2936 (2005) (No. 04-9248); Ortiz-Rosas v. United States, 543 U.S. 1124 (2005) (No. 04-6950); Aguilera-De Flores v. United States, 542 U.S. 906 (2004) (No. 03-9351); Garza-Garza v. United States, 541 U.S. 1031 (2004) (No. 03-8730); Garcia-Saldivar v. United States, 541 U.S. 1011 (2004) (No. 03-8536). There is no reason for a different outcome in this case.

6. Petitioners are correct (05-7496 Pet. 27-31) that there is a conflict in the circuits on the proper application of the plain-error test to claims of Booker error. See also 04-1148 U.S. Br. 11-18 (Rodriguez, supra). The petition for a writ of certiorari in Rodriguez presented the same plain-error issue petitioners raise and alleged the same circuit conflict. The government suggested that this Court grant certiorari in order to resolve the conflict in the circuits, but the Court denied review. 125 S. Ct. 2935. There is no basis for a different outcome here. Indeed, if anything, the transitional plain-error issue presented here is of increasingly diminishing importance as the finite set of cases that might be affected by this Court's decision dwindles in number.

7. Petitioner Guardado-Ortega contends (05-7496 Pet. 33-35) that this Court should grant review to consider whether the Court's

decision in Booker constitutes an "extraordinary circumstance" that would permit a defendant to raise a Booker claim for the first time in a petition for a writ of certiorari. In United States v. Taylor, 409 F.3d 675 (5th Cir. 2005), the Fifth Circuit held that, "absent exceptional circumstances," the court would not consider a Booker argument "raised for the first time in a petition for certiorari," id. at 676.

Petitioner does not challenge the court of appeals' legal standard requiring "extraordinary circumstances" before entertaining new claims that were never raised in the party's court of appeals' briefs or arguments. He argues (Pet. 33), instead, that "the Booker decision itself, which was not issued until ***after*** the Fifth Circuit's original decision in his case," constitutes an "extraordinary circumstance" justifying raising the issue for the first time in a petition for a writ of certiorari.

That challenge to the court of appeals' particularized application of its procedural-bar rule does not warrant this Court's review. First, the passage of time is quickly diminishing and will soon eliminate recurrence of the issue, as district courts now routinely apply Booker to sentencing proceedings in the first instance.

Second, this Court has long recognized that courts of appeals may adopt reasonable rules restricting the consideration of issues not raised in a timely manner, Thomas v. Arn, 474 U.S. 140, 146-148

(1985), and there is no mandate or necessity for uniformity among the circuits in their development or application of such rules, see Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993). Indeed, this Court already has denied review in a number of cases, including as recently as last month, in which courts of appeals declined to entertain new and untimely constitutional challenges to sentences under this Court's intervening decisions in Booker, Blakely, or Apprendi. See, e.g., Gutierrez v. United States, 126 S. Ct. 1141 (Jan. 17, 2006); Claritt v. United States, 126 S. Ct. 417 (2005); Phillips v. United States, 536 U.S. 961 (2002); Garcia v. United States, 534 U.S. 823 (2001). There is no reason for a different result here.[5]

CONCLUSION

The petitions for writs of certiorari in No. 05-7664 and, with respect to the first question presented by petitioners Mendoza-

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[5] Guardado-Ortega also suggests (05-7496 Pet. 33) that the Court should grant review to consider whether a court of appeals may treat a Booker-related claim as abandoned if not raised until after the initial briefing of a case on appeal. Cf. United States v. Levy, 416 F.3d 1273, 1275-1279 (11th Cir.) (applying procedural default rule), cert. denied, 126 S. Ct. 643 (2005). This claim is not fairly included within Guardado-Ortega's question presented, Pet. iv; see 05-7496 Pet. 33-35, and even if it were, this Court has repeatedly rejected similar claims that were based on Booker and its predecessor Blakely. See, e.g., Baxter v. United States, No. 05-8515, cert. denied, 2006 WL 386875 (Feb. 21, 2006); Giglio v. United States, No. 05-8586, cert. denied, 2006 WL 386903 (Feb. 21, 2006); Gray v. United States, No. 05-8141, cert. denied, 126 S. Ct. 1157 (2006); Garcia v. United States, No. 05-8140, cert. denied, 126 S. Ct. 1157 (2006); Cotney v. United States, No. 05-8075, cert. denied, 126 S. Ct. 1119 (2006). There would be no reason for a different result here.

Torres, Suazo-Izaguirre, Alejo-Agramon, Eguia-Hernandez, Armendariz-Chavez, Palencia-Contreras, and Vences only in No. 05-7496, should be held pending the Court's disposition of the petition for a writ of certiorari in Lopez v. Gonzales, No. 05-547, and then disposed of in accordance with the Court's disposition of that case. With respect to all other questions presented in No. 05-7496, the petition should be denied. In addition, with respect to petitioners Colatos-Rivas, Guardado-Ortega, Loredo-Pecina, and Ramirez-Maldonado in No. 05-7496, the petition should be denied in its entirety.

Respectfully submitted.

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FEBRUARY 2006

No. 05-7496 and 05-7664

IN THE SUPREME COURT OF THE UNITED STATES

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CECILIO MENDOZA-TORRES, ET AL., PETITIONERS

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**CERTIFICATE OF SERVICE**

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES**, via e-mail and first-class mail, postage prepaid, this **27th day of February, 2006**.

**[See Attached Service List]**

Paul D. Clement/m

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February 27, 2006

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

05-7496
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SUPREME COURT, U.S.
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No. 05-7664

# In The Supreme Court of the United States

REYMUNDO TOLEDO-FLORES,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## JOINT APPENDIX

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**Petition For Certiorari Filed November 15, 2005**
**Certiorari Granted April 3, 2006**

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TABLE OF CONTENTS

Page

Relevant Docket Entries ..... 1

Indictment ..... 3

Rearraignment Hearing Transcript ..... 4

Sentencing Hearing Transcript ..... 15

Opinion of the United States Court of Appeals for the Fifth Circuit ..... 20

Judgment of the United States Court of Appeals for the Fifth Circuit ..... 22

Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, April 3, 2006 ..... 24

RELEVANT DOCKET ENTRIES

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|---|---|
| 2/22/2004 | ARREST of Reymundo Toledo-Flores |
| 3/16/2004 | INDICTMENT as to Reymundo Toledo-Flores (1) count(s), filed. |
| 3/24/2004 | Arraignment held before Magistrate Judge Marcel C. Notzon Ct Reporter: P Galvan/ERO; Tape Number: 1; Interpreter: D Gonzalez. Appearances: R Jones f/gvt; FPD R Martinez f/dft, filed. Plea of Not Guilty: Reymundo Toledo-Flores (1) count(s) 1 Scheduling dates set; dft remanded to custody. |
| 5/3/2004 | Re-Arraignment held before Judge George P. Kazen Ct Reporter: Val Castano; Interpreter: I Poole; Appearances: M Rinka f/S Hacker f/gvt; FPD R Martinez f/dft, filed. Plea of Guilty: Reymundo Toledo-Flores (1) count(s) 1 (Terminated motions –) Oral plea of guilty to ct 1; order for psi, due 06/08/04; dft remanded to custody. |
| 9/9/2004 | Minute Entry for proceedings held before Judge George P. Kazen: *** Sentencing held on 9/9/2004 for Reymundo Toledo-Flores (1), Count(s) 1, 24 mos to serve this case, consecutive to 6 mos to serve in 5:00m165, revoked; 1 yr tsr; no fine; $100 cvf; dft to be deported; 10 days to appeal. Appearances: Federal Public Defender Raul Martinez f/dft, Diana Saldana f/gvt. (Court Reporter: Leticia E Verdin) (Interpreter: Beatriz Zapata) Deft remanded to custody, filed. |
| 9/10/2004 | JUDGMENT as to Reymundo Toledo-Flores (1) Count 1. (Signed by Judge George P. Kazen). Parties notified. (dflores) (Entered: 9/17/2004) |

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| 9/16/2004 | NOTICE OF APPEAL to US Court of Appeals by Reymundo Toledo-Flores, filed. |
| 10/5/2005 | JUDGMENT of USCA Fifth Circuit (certified copy) 08/17/05; Issued as Mandate 09/21/05; Affirming the judgment of the district court as to Reymundo Toledo-Flores as to [12] Notice of Appeal – Judgment and Sentence Reymundo Toledo-Flores (1) Count 1 USCA No. 04-41378, filed. |
| 10/5/2005 | Certified Copy of Fifth Circuit Court of Appeals PER CURIAM as to Reymundo Toledo-Flores re [12] Notice of Appeal – Judgment and Sentence (USCA No: 04-41378), filed. |

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | § | CRIMINAL NO. |
| | § | |
| v. | § | L-04-546 |
| | § | (Filed Mar. 16, 2004) |
| REYMUNDO TOLEDO-FLORES | § | |

**INDICTMENT**

THE GRAND JURY CHARGES THAT:

**COUNT ONE**

On or about February 22, 2004, in the Southern District of Texas and within the jurisdiction of the Court, **Defendant,**

**REYMUNDO TOLEDO-FLORES,**

an alien, having been previously convicted for illegal entry, did knowingly enter the United States at a place other than as designated by Immigration officers.

In violation of Title 8, United States Code, Section 1325.

A TRUE BILL:

/s/ Illegible
FOREMAN OF THE
GRAND JURY

MICHAEL T. SHELBY
UNITED STATES ATTORNEY
/s/ Illegible for
SCOTT HACKER
Assistant United States Attorney

[1] REPORTER'S RECORD

VOLUME 1 OF 1

TRIAL COURT CAUSE NO. L-04-546

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | U. S. DISTRICT COURT |
| VS. | ) | SOUTHERN DIST. OF TEXAS |
| REYMUNDO TOLEDO-FLORES | ) | LAREDO DIVISION |

VOLUME 1 OF 1

**REARRAINGMENT** [sic] **HEARING**

REPORTER'S RECORD

On the **3rd day of May, 2004,** the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable George P. Kazen, Judge Presiding, held in the United States District Court, Laredo, Texas.

Proceedings reported by machine shorthand.

* * *

[4] PROCEEDINGS

May 3, 2004

THE COURT: All right. Let's see what we've got here. Martin-Rodriguez, possibly Martin Rodriguez Perez. Juan Antonio Baez Perez. Is it Baez?

CLERK: Baez.

THE COURT: Juan Antonio Baez-Perez. Juan Prado-Reyes. Lazaro Lopez-Garcia. Raymundo [sic] Toledo-Flores. Juan Araiza-Carrizales. Daniel Ledesma-Esparza.

Raymundo de La Cruz-Madrigal. Jose Mânuel Moreno-Iraheta.

All right. Martin-Rodriguez; is that you?

(The court identified each defendant.)

THE COURT: Reymundo Toledo-Flores?

THE DEFENDANT: Here.

(The court continues to identify each defendant.)

THE COURT: I've asked you to come up together because you are all charged with the identical crime, and if you are going to plead guilty, then I have to say certain things to you [5] that would be identical and it just saves time. You see that we're already into our third hour of doing this, and we would be here into the evening if we took everybody separately. So it's better for you and for all of us if we can take some of you together.

The charge is that each of you is an alien; that you are not a citizen of the United States of America; that sometime in your life you have already been convicted in a court in this country for illegal entry; and after that, you have done it again. These are all cases from February and March.

You have again illegally entered this country and, specifically, the charge is that you crossed into this country at a place that is not designated by the immigration authorities.

Every alien is supposed to enter through an official doorway where you present your credentials. And it could be an airport or it could be a seaport, but in this part of the nation it's the bridges that connect into Mexico over

the river and you have to come through that port and show your papers to the immigration office.

So the charge is that you didn't do [6] that, that you crossed somewhere else. And usually that means that you just swam the river somewhere or walked through the water somewhere along the many, many miles of boundary.

And that's an illegal entry, and that you already have one conviction for doing that. So that's the charge.

(The court gives latest date of illegal entry to each defendant and receives each defendant's plea of guilty to the charge.)

THE COURT: Toledo, your last entry is alleged to be February 22nd. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: How do you plead to that?

THE DEFENDANT: Guilty.

(The court continues with the other defendants.)

THE COURT: Would each of you raise your right hand and swear to speak the truth here today.

(All defendants sworn.)

THE COURT: I am going to tell you what happened now. I hope you know this already. [7] Your lawyer should have told you all of this already, but if I tell you something that's different or news to you and it bothers you, stop and talk to me about it and I'll try to answer any of your questions, but please do not lie. If you lie, that's a new crime. That's a separate crime and probably a

more serious crime and you can be prosecuted separately for that.

Are you under the influence of any narcotic right now or alcohol or do you have any history in your own life of mental illness or brain disease or psychiatric problems or anything like that?

Mr. Rodriguez?

THE DEFENDANT: No, sir.

(The court continues with the other defendants.)

THE COURT: Toledo?

THE DEFENDANT: No, sir.

(The court continues with the other defendants.)

THE COURT: Is this your own decision after talking to your lawyer and thinking about it, is this your own voluntary decision as to what you want to do in this case?

[8] As far as pleading guilty, is that your own voluntary decision, Mr. Rodriguez?

THE DEFENDANT: Yes.

(The court continues with the other defendants.)

THE COURT: Toledo?

THE DEFENDANT: Yes, sir.

(The court continues with the other defendants.)

THE COURT: The maximum penalty that you could get is two years in prison. That's the worst you can get, and you probably are not going to get that much

because I have to follow guidelines and they generally don't go that high. So you probably will not get that much, but that's the worst you can get.

You also could possibly get a fine of anywhere from $100 up to $250,000. For sure, I am supposed to tax you or assess you $100 in costs and place you on supervision for a year from the day that you finish your sentence.

That means that you will be released and you will be sent back to your country, but you are supposed to be technically on supervision for a year.

[9] In reality, we cannot supervise you in another country. So in your cases, what that means is that we will just keep these files open. These are your personal files and we will just keep these files open for a year from the time that you finish your sentence.

If we don't see you during that time, then we'll close the file, but if we see you again, if you turn around and come back again within a year, then you will get some more time in this case, up to an extra year in prison even though you had already served the original sentence and even though you had been out for a while. So that's what you're facing overall.

Do you understand, Mr. Rodriguez?

THE DEFENDANT: Yes, sir.

(The court continues with the other defendants.)

THE COURT: Toledo?

THE DEFENDANT: Yes, sir.

(The court continues with the other defendants.)

THE COURT: There is typically no bargaining in these cases, but I will ask you if you think you got a bargain. Do you think that you [10] made some kind of deal with the prosecutor or the immigration or the border patrol or anybody else that has induced you to plead guilty or are you expecting some special kind of benefit or reward. You need to tell me so that I can tell you if it's a legitimate promise or not. Do you think you've got any plea bargain going here, Mr. Rodriguez?

THE DEFENDANT: No. sir.

(The court continues with the other defendants.)

THE COURT: Toledo?

THE DEFENDANT: No, sir.

(The court continues with the other defendants.)

THE COURT: In our system here, you are not required to plead guilty. You have the absolute right to plead not guilty and demand a trial. You can ask to be tried by a judge or by a jury of twelve men and women.

You would be present at the trial. You can confront and cross-examine the witnesses brought against you by the government. You could bring your own witnesses. You could be a witness in your own case, but you would also have the right to be silent. Nobody could force you to testify, [11] nobody could make you say anything at all.

And I don't know if I said this, but if you went to trial you could ask for one judge to decide the case or you could ask for 12 people, which is what we call a jury, 12 citizens, and your lawyer would sit with you right here in a public trial.

The interpreter would sit with you; your lawyer could challenge and confront the government witnesses. And, as I said, you can call other witnesses or be a witness, but you could also be silent.

A guilty plea ends all of that. A guilty plea means that your case will be finished here in the next five or ten minutes. There will be no trial. No jury. No witnesses. The government will not have to prove anything. We will just take your word for it that you are guilty, and that's it. I'll sentence you as soon as I can.

But aside from the sentence, your matter would end here in the next few minutes and you would give up those rights that I have been talking about.

Do you understand, Mr. Rodriguez?

[12] THE DEFENDANT: Yes, sir.

THE COURT: Do you still want to plead guilty?

THE DEFENDANT: Yes, sir.

(The court continues with the other defendants.)

THE COURT: Mr. Toledo?

THE DEFENDANT: Yes, sir.

(The court continues with the other defendants.)

THE COURT: How old are you, Mr. Rodriguez?

THE DEFENDANT: 38 years.

(The government presents a factual statement and court accepts plea.)

(The court continues with the other defendants.)